

March 11, 2017

PRI Policy Brief Update: DOL Announces “Temporary Enforcement Policy” in Field Assistance Bulletin

Late in the afternoon on Friday March, 10th, the DOL’s Director of Regulations and Interpretations published Field Assistance Bulletin (“FAB”) [2017-01](#) on the subject of “Temporary Enforcement Policy On Fiduciary Duty Rule.” FABs are routinely issued by the DOL to provide guidance in response to questions that have arisen in “field operations” and may also include “transition enforcement relief that permits employers, plan officials, service providers and others time to respond to new laws or regulations.”

The DOL cited concern expressed by financial services institutions about “investor confusion and other marketplace disruption based on uncertainty about whether a final rule implementing any delay will be published before April 10, whether there may be a “gap” period during which the fiduciary duty rule becomes applicable before a delay is published after April 10, or whether the Department may decide either before or after April 10 not to issue a delay based on its evaluation of the public comments.” The FAB further noted the DOL’s awareness that “some financial services firms and advisers are considering distributing communications to existing retirement investor clients and potential plan and IRA customers that, among other things, include language regarding an uncertain applicability date and conditional acknowledgements of fiduciary status, i.e., that the firm will be a fiduciary but only if the rule becomes applicable” [emphasis added].

Indeed, this is the approach PRI was forced to adopt with respect to our “interim final” [BICE Transition Disclosure](#) and related [PTE compliance resources](#). The DOL recognized that “[a]lthough such conditional communications would represent significant steps towards compliance with the [BICE], they are very likely to create significant confusion among retirement investors.” Citing its “longstanding commitment to provide compliance assistance... so that the fiduciary duty rule and exemptions are implemented in an efficient and effective manner,” FAB 17-01 sets forth the DOL’s “Temporary Enforcement Policy” as follows:

In recognition of the foregoing transitional and other concerns, the [DOL] is adopting the following temporary enforcement policy:

- A. In the event the [DOL] issues a final rule after April 10 implementing a delay in the applicability date of the fiduciary duty rule and related PTEs, the [DOL] will not initiate an enforcement action because an adviser or financial institution did not satisfy conditions of the rule or the PTEs during the “gap” period in which the rule becomes applicable before a delay is implemented, including a failure to provide retirement investors with disclosures or other documents intended to comply with provisions of the rule or the related PTEs.

- B. In the event the [DOL] decides not to issue a delay in the fiduciary duty rule and related PTEs, the [DOL] will not initiate an enforcement action because an adviser or financial institution, as of the April 10 applicability date of the rule, failed to satisfy conditions of the rule or the PTEs provided that the adviser or financial institution satisfies the applicable conditions of the rule or PTEs, including sending out required disclosures or other documents to retirement investors, within a reasonable period after the publication of a decision not to delay the April 10 applicability date. The [DOL] will also treat the 30-day cure period under Section IX(d)(2)(vi) of the BIC Exemption and Section VII(d)(2)(v) of the Principal Transactions Exemption as available to financial institutions that, as of the April 10 applicability date, did not provide to retirement investors the disclosures or other documents described in Section IX(d)(2)(vi) of the BIC Exemption and Section VII(d)(2)(v) of the Principal Transactions Exemption.

To the extent that circumstances surrounding the decision on the proposed delay of the April 10 applicability date give rise to the need for other temporary relief, including prohibited transaction relief, EBSA will consider taking such additional steps as necessary.

This Bulletin is an expression of EBSA's temporary enforcement policy; it should not be read as expressing any view on any decision regarding a final rule on the March 2 proposal, and it does not address the rights or obligations of other parties.

As noted in our recent [Updated PRI Policy Brief & Timeline Re: DOL Fiduciary Rule](#), because the rule is already "effective" (albeit not yet "applicable"), the Administrative Procedure Act ("APA") requires the DOL not only to follow the notice and comment process to change or delay the rule, it would need to publish its final rule (changing the applicability date) at least 30 days prior to the new rule's effective date. It is already too late to provide a 30-day advance publications of a final rule delaying the current rule's applicability date.

Sec. 553(b)(B) of the APA provides a mechanism, however, for circumventing notice and comment procedures when the agency "for good cause" finds that doing so would be "impracticable, unnecessary, or contrary to the public interest." Sec. 533(d) dispenses with the requirement to publish a final rule 30-days in advance of its effective date (or, in this case, the current rule's applicability date)). While agencies are typically afforded significant deference when it comes to issuing regulations, we previously reported that any attempt to invoke the "for good cause" exception would likely be challenged in court by proponents of the rule. The courts are split on the applicable standard of review – some have applied the deference standard while others review good cause justification de novo.

Judicial review de novo is a much more “exacting standard” than the “deferential” posture of arbitrary and capricious review.¹ If no deference is given, then the agency may not be able to adopt a contrary construction in the future.² If an agency fails to establish good cause, the APA provides that courts “shall ... hold unlawful and set aside agency action” that violates “procedure required by law.”³

We had anticipated that the DOL may nevertheless issue an “interim final” rule, shortly after the conclusion of the comment period, delaying the applicability date of the current rule “for good cause” within the otherwise required 30-day advance window.⁴ The FAB may, however, be a recognition on the part of the new administration that a de novo review could result in a finding that the DOL failed to establish good cause for bypassing the APA’s procedural requirements.

The DOL’s “Temporary Enforcement Policy” would allow it time to process the comments and issue a final rule 30 days in advance of its effective date (e.g., at the end of March, making the delay effective at the end of April) without bypassing the APA’s standard requirements leaving the DOL less susceptible to attack in the courts. Indeed, its specific reference to a ““gap” period in which the rule becomes applicable before a delay is implemented” appears to be consistent with this strategy.

More to follow...

¹ See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376-77 (1989); *Natural Res. Def. Council, Inc. v. U.S. E.P.A.*, 683 F.2d 752, 760 (3d Cir. 1982); *NRDC v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979).

² See *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) (“Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”).

³ 5 U.S.C. § 706(2)(D).

⁴ See e.g., *Am. Transfer & Storage Co. v. I.C.C.*, 719 F.2d 1283, 1294 (5th Cir. 1983).